SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 302

ANTHONY NUNZIO ODDO

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

ANTHONY NUNZIO ODDO

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now ANTHONY NUNZIO ODDO, Petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 18th day of June, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37(b)(1)(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 18th day of June, 1968, and thereafter on the 25th day of June, 1968, a stay of mandate was granted by the said Court to your Petitioner for the purpose of Petitioner filing a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. (Appendix B)

QUESTIONS PRESENTED

I

WHETHER OR NOT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER OBJECTION OF COUNSEL GOVERNMENT'S EXHIBITS 3, 4 AND 5 AND ALL OF THE EVIDENCE ADDUCED WITH REFERENCE TO SAID EXHIBITS, SAID EVIDENCE HAVING BEEN HEARD IN A PREVIOUS TRIAL AND JUDGMENT OF ACQUITTAL HAVING BEEN GRANTED AT SAID PREVIOUS TRIAL.

II

WHETHER OR NOT THE COURT ERRED IN ADMITTING EVIDENCE OF A PREVIOUS TRIAL WHEREIN YOUR PETITIONER WAS FOUND NOT GUILTY.

III

WHETHER OR NOT THE ADMISSION OF SUCH EVIDENCE IS VIOLATIVE OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT WITH REFERENCE TO DOUBLE JEOPARDY.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment. Text of same is set forth in Appendix C hereof.

STATEMENT OF THE CASE

The Petitioner was indicted by the Federal Grand Jury in and for the Southern District of Florida on or about February 23, 1966. The indictment contained three counts, one of which charged the Appellant with transfer and delivery to another of a counterfeit note for the purpose of passing same in violation of Section 473, Title 18, U.S. Code. Counts 2 and 3 charged the Appellant with passing counterfeit notes with intent to defraud in violation of Section 472, Title 18, U.S. Code. Counterfeit notes in each instance were $10.00 notes.

The appellant was tried twice. In July of 1966, he was tried with a jury before the Honorable Emett C. Choate, which resulted in a verdict of not guilty as to Count One and a disagreement as to Count Two. As to Count Three, the Court granted Appellant's motion for judgment of acquittal at the close of the Government's case.

The second trial as to Count Two was begun on February 13, 1967, with a jury before the Honorable Wm. O.

Mehrtens and a verdict of guilty was brought in by the jury on February 14, 1967.

The Government produced at the trial, over objection of Appellant's counsel, all of the evidence produced at the first trial as to Counts One and Three, as well as to Count Two. The Government's witnesses testified that on December 7, 1965, the Appellant Oddo went into a Publix Super Market in Hallandale, Florida, together with another individual named David Esterkes, that on this occasion, Oddo, together with Esterkes, went through an aisle where a cashier by the name of Kamp was in charge and that Oddo made a purchase of a small item and, in payment for this purchase, he tendered a $10.00 bill. Esterkes also made a small purchase and he also tendered a $10.00 bill in payment of same. Oddo then went back through the store and came back through the next aisle with a small purchase and handed a $10.00 bill to a cashier named Beverly Nichols. The bagboy named Robert Pole was attracted to this transaction and he took the top $10.00 bills from the registers of Kamp and Nichols. He thought there was something funny about the money so he gave the notes to a Miss Martin, who was one of the head cashiers, and then the bagboy went out and took down the license number of Oddo and Esterkes. The police and Secret Service were called, the bills were determined to be counterfeit, and later the Appellant Oddo and Esterkes were apprehended. Esterkes was not tried but was used as a Government witness and he testified that he had spoken to Oddo with reference to counterfeit money.

The Government also produced evidence that the Appellant Oddo was a patient of Dr. Sumner Cohen and that, some time in the middle of December, 1965, the Appellant Oddo gave to Dr. Cohen some bills which were placed with other money in his wallet. That on the 17th of December, the said Dr. Cohen used the money that was given to him by Oddo and others to purchase jewelry at the Continental Jewelry Store in the Seybold Building in Miami. From there, some of the money was sent to the First National Bank on the Monday following December 17, 1965, and the teller observed that one of the bills was counterfeit. The Government further produced a witness who was sent by the Continental Jewelry Store to buy stamps at the Post Office where another note was detected as counterfeit and a third note was found in the Continental Jewelry Store.

The foregoing, together with all of the witnesses testifying as to their knowledge of the facts, was all of the testimony adduced by the Government in support of their case.

REASONS FOR GRANTING WRIT OF CERTIORARI

It is respectfully submitted that the writ sought by your Petitioner should be granted for the reason that the Fifth Circuit Court of Appeals in applying the principle that evidence of acquittals should be permitted for the purpose of showing knowledge and intent of a person accused of crime is violative under Petitioner's constitutional rights under the Fifth Amendment as to double jeopardy in that the Court is allowing the Government in its proof to do indirectly what it cannot do directly and it is further respectfully submitted that the opinion of the Fifth

Circuit Court of Appeals failed to properly apply the facts in this case to the law as set down in **United States v. Byrd**, 352 Fed. 2d 570, C.A.N.Y., 1965, which held as follows:

> "One of these points concerns the admission by the trial court of evidence of Byrd's activities in connection with the auditing of the Sandberg tax return. The Government offered it as a part of its main case for the purpose of showing criminal intent. A vigorous objection was made by the defense but the court admitted it. The admissibility of this kind of evidence is 'a matter in which the trial judge should be allowed a wide range of discretion.' United States v. Feldman, 136 F. 2d 394, 399 (2 Cir.). The exercise of discretion must be addressed to a balancing of the probative value of the proferred evidence, on the one hand, against its prejudicial character, on the other. The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent or tends to negative the claim that the acts were committed innocently or through mistake or misunderstanding.
>
> "It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowl-

edge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged. The court in its colloquy with defense counsel conceded that prejudice of this sort would result to Byrd in letting in the evidence.

"From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the Sandberg incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the Sandberg tax audit.

"Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its main case. The Defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. McCormick, Evidence, §157 at 331 (1954); Vol. 1 Wharton's Criminal Evidence, §237 at 528 (12th ed. 1955). Nor did the Government suffer from a lack of evidence of intent. Kaufman's testimony relat-

ing to the first two counts furnished ample evidence of knowledge and intent, of the same kind and quality as that shown by his testimony concerning the Sandberg tax returns. There was therefore no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F.2d 61, 67 (2nd Cir. 1963). It is, of course, conceivable that in some cases proof of the offenses charges would contain little or nothing from which an inference of guilty intent could be drawn. In such a case a trial judge would, in the exercise of his discretion, be justified in admitting as part of the Government's case, proof of a prior similar offense to show knowledge or intent. For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion. Under such circumstances the better practice would be to sustain the objection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted."

It is respectfully suggested further that at the trial the evidence submitted over objection of counsel as to three alleged counterfeit bills marked Exhibits 3, 4 and 5 for the Government and having been passed to one

Dr. Cohen that the testimony will show that Dr. Cohen could not identify those bills and could not state at any time that they were in his wallet. The only thing that he can state is that he was given some money by the Petitioner which may have been $10.00 bills.

It is respectfully suggested that, under those circumstances where the identification of the bills supposedly passed is questionable as to their coming from your Petitioner and the Court having granted a judgment of acquittal at the close of the Government's case at the previous trial of your Petitioner and the Court allowing all of the evidence with reference to said exhibits over objection of counsel to be heard by the jury was highly prejudicial and violative of Defendant's constitutional rights and in direct conflict with **United States v. Byrd,** supra.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A) in deciding this point more fully raised in your Petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix C.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

LURIE & CAPUANO
Attorneys for Petitioner
1409 Biscayne Building
Miami, Florida 33130

By_____
Nicholas J. Capuano

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Petition was mailed to the Solicitor General, Department of Justice, Washington, D. C., this _____ day of July, 1968.

_____
Nicholas J. Capuano

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24918

ANTHONY NUNZIO ODDO,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 18, 1968.)

Before POPE,* TUTTLE and CLAYTON, Circuit Judges.

PER CURIAM: The appellant was indicted on three counts for the crime of passing counterfeit money. The trial on these three counts ended with a verdict of not guilty as to count one, disagreement of the jury as to count two, and acquittal as to count three. He was then tried again on the second count. During the course of the trial the government introduced in evidence all of

* Of the Ninth Circuit, sitting by designation.

the evidence that had previously been introduced in support of the two counts on which the appellant had been acquitted. This was over the objection of the appellant, who now contends that the admission of such evidence was error.

The rule that permits the introduction of evidence relating to similar transactions to show knowledge and intent of a person accused of crime, is not restricted to proof of transactions adequate to establish guilt of a prior or different offense. Under the principle announced by this court as early as *Pilcher v. United States*, 113 Fed. 248, we conclude that the trial court did not err in the admission of this evidence.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

June 25, 1968

Mr. Max Lurie
Attorney at Law
19 W. Flagler Street
1409 Biscayne Bldg.
Miami, Fla. 33130

Re: No. 24918 — Anthony Nunzio Oddo -vs-
United States of America.

Dear Sir:

This is to advise that your motion for stay of issuance of the mandate has been granted for a period of thirty (30) days from November 10, 1967, provided within that time there is filed with this office the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed.

You will note that only thirty (30) days has been granted, since under Rule 21 of the Supreme Court a petition for writ of certiorari in a criminal appeal must be filed within thirty (30) days from the entry of judgment, unless the time is extended by the Supreme Court.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

By G. F. GANUCHEAU
G. F. Ganucheau
Chief Deputy Clerk

/lgc
cc: Messrs. Lloyd G. Bates, Jr.
and Neal R. Sonnett

APPENDIX C

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; **nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;** nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24918

ANTHONY NUNZIO ODDO,

Appellant,

-versus-

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

BRIEF OF APPELLANT

MAX LURIE of
LURIE & CAPUANO
Attorneys for Appellant
1409 Biscayne Building
Miami, Florida 33130

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction of the United States District Court for the Southern District of Florida.

The following symbol will be used throughout the brief: "T" for Transcript of Record.

The Appellant, ANTHONY NUNZIO ODDO, in a trial by jury, was convicted of passing a counterfeit bill with intent to defraud and in violation of Section 472, Title 18, U. S. Code, (T-221), from which conviction and sentence of two years in the custody of the United States Marshal he filed his Notice of Appeal (T-221). The appellant was indicted by the Federal Grand Jury in and for the Southern District of Florida on or about February 23, 1966. The indictment contained three counts (T-217-218). Count one charged the appellant with transfer and delivery to another of a counterfeit note for the purpose of passing the same in violation of Section 473, Title 18, U. S. Code. Counts two and three charged the appellant with passing counterfeit notes with intent to defraud in violation of Section 472, Title 18, U. S. Code. The counterfeit notes in each instance were $10.00 notes.

The appellant was tried twice. In July of 1966, he was tried with a jury before the Honorable Emett C. Choate, which resulted in a verdict of not guilty as to Count One and a disagreement as to Count Two (T-219). As to Count Three, the Court granted appellant's motion for judgment of acquittal at the close of the Government's case (T-220).

The second trial as to Count Two was begun on February 13, 1967, with a jury before the Honorable Wm. O. Mehrtens and a verdict of guilty was brought in by the jury on February 14, 1967.

The Government produced at the trial, over objection of appellant's counsel, all of the evidence produced at the first trial as to Counts One and Three, as well as to Count Two. The Government's witnesses testified that on December 7, 1965, the appellant Oddo went into a Publix Super Market in Hallandale, Florida, together with another individual named David Esterkes, that on this occasion, Oddo, together with Esterkes, went through an aisle where a cashier by the name of Kamp was in charge and that Oddo made a purchase of a small item and, in payment for this purchase, he tendered a $10.00 bill. Esterkes also made a small purchase and he also tendered a $10.00 bill in payment of same. Oddo then went back through the store and came back through the next aisle with a small purchase and handed a $10.00 bill to a cashier named Beverly Nichols. The bagboy named Robert Pole was attracted to this transaction and he took the top $10.00 bills from the registers of Kamp and Nichols. He thought there was something funny about the money so he gave the notes to a Miss Martin, who was one of the head cashiers, and then the bagboy went out and took down the license number of Oddo and Esterkes. The police and Secret Service were called, the bills were determined to be counterfeit, and later the appellant Oddo and Esterkes were apprehended. Esterkes was not tried but was used as a Government witness and he testified that he had spoken to Oddo with reference to counterfeit money.

The Government also produced evidence that the appellant Oddo was a patient of Dr. Sumner Cohen and that, some time in the middle of December, 1965, the appellant Oddo gave to Dr. Cohen some bills which were placed with other money in his wallet. That on the 17th

of December, the said Dr. Cohen used the money that was given to him by Oddo and others to purchase jewelry at the Continental Jewelry Store in the Seybold Building in Miami. From there, some of the money was sent to the First National Bank on the Monday following December 17, 1965, and the teller observed that one of the bills was counterfeit. The Government further produced a witness who was sent by the Continental Jewelry Store to buy stamps at the Post Office where another note was detected as counterfeit and a third note was found in the Continental Jewelry Store.

The foregoing, together with all of the witnesses testifying as to their knowledge of the facts, was all of the testimony adduced by the Government in support of their case.

STATEMENT OF THE QUESTIONS INVOLVED

The Court erred in admitting into evidence, over objection of counsel, Government's Exhibits 3, 4 and 5 and all of the evidence adduced with reference to said exhibits.

ARGUMENT

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER OBJECTION OF COUNSEL, GOVERNMENT'S EXHIBITS 3, 4 AND 5 AND ALL OF THE EVIDENCE ADDUCED WITH REFERENCE TO SAID EXHIBITS.

Prior to the commencement of the actual presentment of evidence, a conference was held with the trial

judge and counsel for the appellant and counsel for the Government, with reference to the introduction of evidence of other offenses, namely the testimony as to Counts One and Three which resulted in acquittals for appellant in the first trial (T-5-21). The appellant through his counsel at that time objected to the introduction of said evidence but the Court decided to allow the evidence. (T-21)

The Government presented to the Court, after evidence given by Government's witnesses Greenbaum (T-89-107), Simkovic (T-105-122), Clayton (T-122-129), Mullins (T-130-137), Lindsley (T-148-154) and Cohen (T-137-148), for introduction into evidence, Exhibits 3, 4 and 5. These exhibits are $10.00 counterfeit notes allegedly given by the appellant Oddo to Dr. Sumner Cohen on or about December 16, 1965, which was the subject of Count Three of the indictment herein and which count resulted in a discharge of the appellant at the first trial by reason of the granting of a judgment of acquittal by the trial judge at the first trial.

Dr. Sumner Cohen testified (T-137) that the appellant Oddo was a patient of his and just prior to December 18 (T-138) Oddo came into his office and put some money in his pocket as a gift. It was not a fee (T-139). He put this money in his wallet with about $100.00 he had in his wallet.

The following questions on direct were asked of Dr. Sumner Cohen and these answers were given (T-140).

Q How much did Mr. Oddo put in your pocket?
A Well, it was hard to say at the time. I don't

recall whether it was three or four bills that he put into my pocket. And on the basis of my originally having approximately $100 in my pocket, I would say it was either $30 or $40.

Q In what form?

THE COURT: What he is asking you, sir, were they $1 bills, $5 bills, $10 bills, $20 bills or a combination of them or what? Do you recall what denominations?

THE WITNESS: I really cannot, sir.

BY MR. BATES:

Q What happened to the money you got from Mr. Oddo?
A Well, I used this to pay bills at the jewelers. I was then advised several days later that there was something wrong with some of the moneys that I had given to them, . . .

And by the District Attorney:

Q And you don't know what form that was in, Mr. Oddo?
A Well—

MR. LURIE: I object. He already answered the question, Judge.

THE COURT: I will let him answer it if he can, if he can recall.

A Well, I had been advised afterwards.

THE COURT: No, sir, not what you have been advised afterwards. It is what you remember yourself.

THE WITNESS: Well, it's a little vague in my mind. But I believe they were $10 bills.

He then testified that he used the money Oddo gave him with the other money to pay for some jewelry he purchased at the Continental Jewelry Store where Greenbaum was employed and Simkovic was the owner. Dr. Cohen further testified and identified Exhibits 3, 4 and 5 as bills that he had initialled on January 10, 1966, after they were brought to him by a Government Agent. On cross examination (T-146-147), the following questions were asked by appellant's counsel and these answers were given:

Q Dr. Cohen, referring to those three bills when they were shown to you on January 10, did you state to this gentleman here that those bills were the bills that were in your wallet when you went to the Continental Jewelers? Did you identify them as definitely being in your wallet?

A I don't believe I had, no.

Q As a matter of fact, you don't know where these bills came from, do you?

A That's right.

This evidence is what, in the trial Court's opinion at the first trial, was not sufficient to prove that the appellant had commited the offense charged in Count Three and granted a judgment of acquittal.

Counsel for appellant is cognizant of the fact that our courts have consistently held that evidence of prior offenses can be admitted in evidence to prove knowledge, intent and a plan of action if the evidence has probative value, if the evidence is connected with the main case and not too remote in time, as cited in **Pardo vs. United States,** 369 Fed. 2d 922, C.A.L.A. 1966. Counsel for appellant is also cognizant of the fact that this Honorable Court, in the case of **Pilcher vs. United States,** reported at 113 Rep. 248, held that even a finding of not guilty of a previous offense could be admitted in evidence for the purpose of proving intent and knowledge.

The Courts have also held at times that even subsequent offenses can be admitted to prove intent and knowledge as cited in **Myers vs. United States,** 377 Fed. 2d 412. However, in all of the cases which I have examined, the proof showed a definite commission of a prior or similar offense in order to show that the Defendant had knowledge and intent to commit the offense in the main case. In this case, the proof that the appellant gave Exhibits, 3, 4 and 5 to Dr. Cohen is definitely questionable as shown by his testimony. The jury, in order to find intent from this testimony, would have to decide that the appellant was guilty of committing the offense as charged in Count Three of the indictment, which the Court had already decided that the testimony of Dr. Cohen and all of the other witnesses who also testified at the first trial, was insufficient to prove that the appel-

lant had passed Exhibits 3, 4 and 5 and with intent to defraud. This evidence was supposedly introduced for the purpose of asking the jury to determine whether he was guilty of committing that offense in the Third Count.

The only person who could definitely state that appellant had given Exhibits 3, 4 and 5 to Dr. Cohen was Dr. Cohen, and he definitely states that he does not know if Exhibits 3, 4 and 5 were ever in his wallet (T. 147). The Court, in **United States vs. Byrd**, 352 Fed. 2d 570, C.A.N.Y., 1965, held as follows:

> "One of these points concerns the admission by the trial court of evidence of Byrd's activities in connection with the auditing of the Sandberg tax return. The Government offered it as a part of its main case for the purpose of showing criminal intent. A vigorous objection was made by the defense but the court admitted it. The admissibility of this kind of evidence is 'a matter in which the trial judge should be allowed a wide range of discretion.' United States v. Feldman, 136 F.2d 394, 399 (2 Cir.). The exercise of discretion must be addressed to a balancing of the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other. The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent or tends to negative the claim that the

acts were committed innocently or through mistake or misunderstanding.

"It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged. The court in its colloquy with defense counsel conceded that prejudice of this sort would result to Byrd in letting in the evidence.

"From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the Sandberg incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the Sandberg tax audit.

"Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in

its main case. The defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. McCormick, Evidence, §157 at 331 (1954); Vol. 1 Wharton's Criminal Evidence, §237 at 528 12th ed. (1955). Nor did the Government suffer from a lack of evidence of intent. Kaufman's testimony relating to the first two counts furnished ample evidence of knowledge and intent, of the same kind and quality as shown by his testimony concerning the Sandberg tax returns. There was therefore no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F.2d 61, 67 (2nd Cir. 1963). It is, of course, conceivable that in some cases proof of the offenses charged would contain little or nothing from which an inference of guilty intent could be drawn. In such a case a trial judge would, in the exercise of his discretion, be justified in admitting as part of the Government's case, proof of a prior similar offense to show knowledge or intent. For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be

> an abuse of discretion. Under such circumstances the better practice would be to sustain the objection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted."

Counsel contends that the allowance of evidence of the testimony of witnesses Greenbaum, Simkovic, Clayton, Mullins, Lindsley and Cohen, was an abuse of discretion (T-89-148). The testimony was not necessary to prove the Government's main case and was highly prejudicial.

In fact, the Court on Transcript, Page 188, stated as follows:

> "I probably would have been of the opinion that the Government hadn't proven that offense beyond a reasonable doubt sufficient to take it to the jury."

And further stated that this evidence is admissible solely for the purpose of going to the intent and motive and state of mind if they find first that he passed the money. In other words, he is allowing them to determine whether he actually committed that offense as disclosed through the witnesses Simkovic, Clayton, Lindsley and Cohen.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appellant is entitled to judgment of acquittal and that if any judgment of acquittal is not granted, the appellant should be given a new trial.

MAX LURIE of
LURIE & CAPUANO
Attorneys for Appellant
1409 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

STATE OF FLORIDA]
COUNTY OF DADE]

MAX LURIE, being first duly sworn, deposes and says: That he has this _____ day of December, 1967, mailed a true copy of the foregoing Appellant's Brief to the following: WILLIAM MEADOWS, United States District Attorney, Federal Building, Miami, Florida.

MAX LURIE

Sworn to and subscribed before me this _____ day of December, 1967.

Notary Public, State of Florida
My commission expires:

APPENDIX "E"
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24918

D. C. Docket No. 66-93-CR-WM

ANTHONY NUNZIO ODDO,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before POPE,* TUTTLE and CLAYTON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 18, 1968

*Of the Ninth Circuit, sitting by designation.
Issued as Mandate: